LIM NYIT LOONG

v.

OCCUPIER(S) OF TB3783 TAMAN PASADENA, TAWAU & PERSON(S) UNKNOWN

HIGH COURT SABAH & SARAWAK, TAWAU
TUAN IAN H.C. CHIN J
[ORIGINATING SUMMONS NO. T(24) OF 1995]
28 AUGUST 1995

PRACTICE & PROCEDURE: *Vacant possession of house - Application thereof - Order 89 Rules of High Court - Competing claims - Whether plaintiff had notice of another's interest - Whether house occupied with consent - Whether there was conspiracy to defraud another - Triable issues.*

PRACTICE & PROCEDURE: *Order 89 Rules of High Court - Plaintiff aware of dispute concerning house - Plaintiff aware that factual and legal issues requiring trial will arise - Whether action should be begun by writ - Whether the Court should order that action to proceed as if begun by writ - Whether case should be dismissed.*

The plaintiff had on 1 September 1994 entered into an agreement with the developer to buy a house situated in the housing estate known as Taman Pasadena. He later realised that the house was occupied by persons unknown to him. The occupiers were requested to vacate the house but failed to do so, and the plaintiff applied to the Court under O. 89 of the Rules of the High Court for possession of the house.

It was deposed by the intended defendants, Pang Ah Foh (Pang) and Ibno bin Saharani (Ibno), Pang's employee, both of whom applied to be joined as defendants, that one Shim Ngit Fah (the wiring contractor) was engaged by the housing developer to do all wiring works for all the houses in consideration of which the developer agreed to transfer the said house to him. The wiring contractor then decided to sell the house to Pang, informed the developer of his intention, and the developer arranged for the subsequent transfer to Pang. An agreement was entered into between the developer and Pang and the keys were delivered to Pang. Pang then allowed Ibno and his family to occupy the house. The plaintiff on the other hand, procured an affidavit from the director of the developer to say that the wiring contractor had not completed his work, which the wiring contractor denied.

It was contended by Pang that there were issues to be tried, i.e, whether the plaintiff had notice of the interest of Pang Ah Foh, and whether the plaintiff had conspired with the developer to defraud Pang.

Held:

[1] The plaintiff did not in his affidavits say what he did before he decided on buying the house. That he chose to keep quiet as to whether he did visit the house before he committed himself to purchase it lends tremendous weight to the contention that he must have known of the interest of Pang. This is an arguable issue.

[2] It can be arguably inferred from his silence that the plaintiff had conspired with the developer to defraud Pang. The probability of conspiracy to defraud becomes stronger when one takes into account the fact that no one would buy the house knowing that it was occupied, and yet make no provision in the sale and purchase agreement for the eventuality

of the failure of the developer to evict the occupant. This generosity of the plaintiff betrays his co-operation with the developer in disposing of the house.

[3] The fact that the developer had only complained about the alleged failure of the wiring contractor to complete the works three years after the transfer form was executed and keys to the house allowed to be taken belie the indebtedness of the wiring contractor or Pang.

[4] Order 89 r. 1 recognises the fact that the claim of the plaintiff may be subject to the consent that was given by the developer, the "predecessor in title", to Pang to occupy the house. The fact that the plaintiff is now the registered owner does not in any way mean that the consent of the developer for Pang to occupy the house had been or can be revoked, and so too, a party would not be barred from claiming possession against a registered owner when the registration of title was without consent.

[5] The plaintiff appeared to have withheld information as to his knowledge that the house was occupied before he bought it, and was aware of the disputes concerning the house. It was abundantly clear to him before he commenced the present proceedings that he would face the obstacles that have been put forth and these are actual issues requiring a trial and *viva voce* evidence. It is patent upon the face of the summons or the affidavits in its support that the complaints raised cannot but be tried in a writ action.

[Claim dismissed with costs].

Cases referred to:
John Wallingford v. The Directors of the Mutual Society [1880] 5 AC 685 ***(refd)***
Perbadanan Pembangunan Pulau Pinang v. Chon Ah Yok [1993] 2 CLJ 352 ***(refd)***
Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 28 r. 8(1), O. 89 r. 1

For the plaintiff - Simon Shim; M/s. Shim Pang & Co.
For Pang Ah Foh & Ibno bin Sarahani - Lim Chin Wu; M/s. Chong & Pang

JUDGMENT

Ian H.C. Chin J:

This application by Lim Nyit Loong ("the plaintiff') under O. 89 of the Rules of the High Court, 1980, to recover possession of a house, known as Lot 92, erected on Country Lease No. 105435790 ("the house") was taken out on 10 June 1995 and arguments were heard on 3 August 1995, whence it was adjourned to today for judgment.

Background

The house is one of many in a housing estate, called Taman Pasadena, constructed by Leau King Doo & Sons Development Sdn. Bhd. ("the developer"). On 1 September 1994 the plaintiff entered into an agreement to buy the house from the developer. The purchase price, was financed by a finance company. As a result, on 10 October 1994, the plaintiff became the registered owner of the title to the house while the said finance company became the chargee. It was, according to the plaintiff, after he had bought the property that he realised there were a number of persons occupying the house. The plaintiff thereafter instructed his solicitors to demand that the persons vacate the house but despite that the persons remained thereon. Hence this application.

Pang Ah Foh and Ibno bin Sarahani applied to be joined as defendants. Their affidavit evidence, together with that of one Shim Ngit Fah ("the wiring contractor"), which was filed in support of the case of the intended defendants, are as follows. The wiring contractor was engaged by the developer to do the wiring works for all the houses in Taman Pasedena in consideration of which the developer agreed to transfer the house to the wiring contractor. Subsequently, the wiring contractor decided to sell the house to Pang Ah Foh. It was thus, that the wiring contractor and Pang Ah Foh on 2 January 1991, wrote to the developer to state as follows:

Re: Lot 92 Taman Pasadena Tawau

1. Please be informed that I wish to contra the above lot against works to be done at Taman Pasadena Bukit Bintang for a total consideration of RM39,500.

2. The above-mentioned lot is to be transferred to Pang Ah Foh (Nric No. H0038163).

It was a result of this letter from the wiring contractor and Pang Ah Foh that the developer on 10 January 1991, issued the following letter:

M/s. Lawrence Chai & Peter Soong
P0 Box No. 834
91008 Tawau

Dear Sirs

Re: Lot 92 Taman Pasadena Tawau

Please be informed that we have sold the above-mentioned to Mr. Shim Ngit Fah of Man Soon Letrik Service.

We have been instructed by Mr. Shim Ngit Fah to transfer the said lot directly to Mr. Pang Ah Foh (Nric No. H0038163).

Kindly prepare the necessary documents.

Thank you.

Yours faithfully,
for Leau King Doo & Son Development Sdn. Bhd.

(Signed)

Peter K.S. Leau

c.c. Shim Ngit Fah
Pang Ah Foh

What ensued was an agreement being on 17 January 1991, entered between the developer and Pang Ah Foh and the keys to the house being delivered on 30 January 1991 and from April 1991, Pang Ah Foh let his employee, the said Ibno bin Sarahani and his family members, occupy the house which they still do up to now. Pang Ah Foh had fully paid the consideration for the house to the wiring contractor and the wiring contractor had also completed the necessary wiring works as consideration for the house which the developer sold to him and which he in turn sold to Pang Ah Foh the memorandum of transfer and the attending documents to effect a transfer of the house to Pang Ah Foh had already been executed by the developer and Pang Ah Foh and were kept in the office of the developer's solicitors. Pang Ah Foh had all this while been chasing the developer and the said solicitors regarding the transfer of the house and was told that the transfer was being processed. Nothing happened until sometime in November 1994, when the plaintiff approached Pang Ah Foh to claim that he had bought the house.

a In response to those allegations, the plaintiff procured an affidavit from Leau King Doo, a director of the developer, to say that the wiring contractor had not completed the wiring works. The terms of his affidavit evidence in this regards are as follows:

> 4. The basis of the company's agreement to sell Lot 92 Taman Pasadena to Pang Ah Foh was in return for the agreement that Shim Ngit Fah would complete works to be done for the company in Taman Pasadena and Taman Bukit Bintang as evidenced in
b "PAF 1".
>
> 5. However, works on Taman Bukit Bintang were not completed and I humbly refer to paragraph 9 of Shim Ngit Fah's affidavit where he only affirms to have completed works in Taman Pasadena and omits mention of Taman Bukit Bintang. Thereby, signifying his admission that works had not been completed.

c The exhibit "PAF l" which the affidavit refers to is a letter emanating from the developer to their solicitors on 25 March 1994, and it says:

> M/s Lawrence Chai & Peter Soong,
> Etc ...
>
> **Re: Outstanding Due**
> **Shim Ngit Fah (Nric H0130388)**
> d **Amount Due: RM51,286.50**
>
> We refer to the quotation from Shim Ngit Fah of Man Soon Electrical Service dated 16 June 1989.

Total Works done	RM83,050.00
Less - Total advances and payments from our company	55,336.50
e To contra Lot 88, Taman Pasadena	39,500.00
Amount due to us	11,786.50
Add: To contra Lot 92, Taman Pasadena for works to be done at Taman Bukit Bintang	39,500.00
Total amount due to us now	51,286.50

> f Despite repeated reminders, Mr. Shim Ngit Fah has failed to carry out electrical works to be done at Taman Bukit Bintang as per his letter to us dated 23 November 1990.
>
> Please proceed with legal action recover the amount due to us and to revoke the sale & purchase agreement dated 17 January 1991 between our company and Mr. Shim Ngit Fah's nominee, Mr. Pang.
>
> g Thank you.
>
> Yours faithfully,
>
> (Signed)
> Peter K. S. Leau.

h It was a result of this letter that the developer's solicitors issued a letter dated 4 April 1994, to Shim Ngit Fah to allege that the electrical works had not been carried out at Taman Bukit Bintang and to demand a payment of the sum of RM51,286.50 which was alleged to be due in the following manner, to quote:

Advance & payments by our clients	RM55,336.50
Add: To contra Lot 88 Taman Pasadena	39,500.00
i To contra Lot 92 Taman Pasadena	39,500.00
	134,336.50

Less: Work done	83,050.00
Total outstanding balance	51,286.50

On the very day too, the said solicitors also demanded payment of RM39,500 from Pang Ah Foh as unpaid purchase price for the house within 14 days on pain of termination of the agreement. This was followed up with a letter dated 25 April 1994, to demand vacant possession of the house.

The wiring contractor refuted the allegation of his indebtedness and gave an account of how he had performed works as a result of which the two houses were given to him, one of which he sold to Pang Ah Foh while another, to someone else. The wiring contractor maintained that there is still a sum of RM31,500 owing by the developer to him.

Contentions & Conclusions

It was upon the backdrop of facts and allegations that I have set out, *supra*, that Pang Ah Foh contends that there are issues to be tried which is (1) whether the plaintiff had notice of the interest of Pang Ah Foh and (2) whether the plaintiff had conspired with the developer to defraud Pang Ah Foh.

As for the issue (1), Mr. Simon Shim faintly argued that the plaintiff only knew of the occupation of the house by Ibno bin Sarahani, the employee of Pang Ah Foh, sometime in November 1994. The plaintiff did not in his affidavits say what he did before he decided on buying the house. It is inherently incredible that anyone would buy a house which was already completed some three years ago without first visiting and viewing the house but this is what the plaintiff wants the Court to believe that this is the case with him. That he chose to keep quiet as to whether he did visit the house before he committed himself to purchase it lends tremendous weight to the contention that he must have known of the interest of Pang Ah Foh. At the very least, this is an arguable issue.

It follows also, in respect of the issue (2), that it could arguably be inferred from his silence that the plaintiff had conspired with the developer to defraud Pang Ah Foh. The probability of a conspiracy to defraud becomes stronger when one takes into account the fact that no one would buy the house knowing that it was occupied, the knowledge of which, I have stated, *supra*, could be justified, and yet make no provision in the sale and purchase agreement, as is the case here, for the eventuality of the failure of the developer to evict the occupant. This generosity of the plaintiff betrays his co-operation with the developer in disposing of the house. Again, it cannot be said that there is no dispute as regards the probability of a conspiracy to defraud. As for the developer, there is substance in the submission, that they should complain about the alleged failure of the wiring contractor to complete the works only some three years after they executed the transfer forms and after they had allowed the keys to the house to be taken belie the indebtedness of the wiring contractor or Pang Ah Foh. Given what I have said so far, I am of the view that sufficient facts have been deposed to as pointing to or giving rise to the inference of fraud and conspiracy to defraud as to allow the defence to be raised (*John Wallingford v. The Directors of the Mutual Society* [1880] 5 AC 685).

It must be foremost in our mind the nature of an O. 89 proceedings. For that purpose, O. 89, r. 1 is reproduced here:

> Where a person claims possession of land which he alleges is occupied solely by a person

> or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this order.

From the facts I have already related, one aspect of Pang Ah Foh's claim is that he was allowed possession by the developer, the predecessor in title of the plaintiff, and that this consent, because of full payment of the purchase price for the house, cannot be revoked. The full payment of the purchase house is, as stated earlier, disputed by the developer. When O. 89, r. 1, speaks of "predecessor in title", it recognises the fact that the claim of the plaintiff may be subject to the consent that was given by the developer to Pang Ah Foh to occupy the house. From the evidence I have adverted to it cannot be denied that Pang Ah Foh had been allowed possession of the house since 1991. The issue is then whether such consent was lawfully withdrawn or terminated and whether it was so terminated. This is the area where the facts are hotly disputed. The fact that the plaintiff is now the registered owner does not in any way mean that the consent of the developer for Pang Ah Foh to occupy the house had been or can be revoked and so too, a party would not be barred from claiming possession against a registered owner when the registration of the title was without consent (*Perbadanan Pembangunan Pulau Pinang v Chon Ah Yok* [1993] 2 CLJ 352). As for the incidence of title, if a writ had been taken out Pang Ah Foh could counterclaim for a declaration that the registration of the plaintiff was null and void for fraud.

Given what I have said, the disputes and the facts of this case fall outside the scope of O. 89, r. 1. It leaves the question of whether I should dismiss the action outright or order that it proceeds as if begun by writ and give the necessary directions. In this regard, I have the benefit of the recent decision of *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457, 479, where it is recognised that it is the law that the trial Judge after hearing an originating summons can order that the action be continued as if begun by writ. He has a discretion. As for discretion, this is how, the learned appeal Judge said, it should be exercised, *viz.*:

> There is absolutely no doubt that he **may**, generally speaking, exercise the power under r. 8(1) of O. 28 where it appears to him that *via voce* evidence is required to decide upon factual disputes for the determination of which the originating summons procedure is manifestly unsuitable. Equally, he **may**, in an appropriate case, dismiss the summons and leave the plaintiff to commence an action by writ. Cases in which a dismissal may be appropriate include those in which it is patent upon the face of the summons or the affidavit in its support that the complaints raised cannot but be tried in a writ action. The plaintiff, in such a case as that alluded to, must be taken to know *ab initio* that the mode he selected to commence the proceedings was manifestly unsuitable.

Turning to the history of this case, the plaintiff in support of his application merely affirmed in his affidavit that he became the registered owner on 10 October 1994 and it was in November 1994 that be became aware of the occupants in the house on whom he demanded possession. It was only in subsequent affidavits that the plaintiff disclosed the facts that I adverted to earlier. It seems to me that the plaintiff was withholding all this information when he made the present application and that he was aware of the dispute concerning the house. Thus it was abundantly clear to him before he commenced the present proceedings that he would face the obstacles that have now been put forth and these are factual and legal issues requiring a trial and *viva voce* evidence. Thus, upon

the principle enunciated in *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman*, I exercise my discretion to dismiss the action herein with costs to Pang Ah Foh and Ibno bin Sarahani.